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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RICKEY EDWARD STUART, Defendant and Appellant.	E048327 (Super.Ct.No. SWF027732) OPINION

APPEAL from the Superior Court of Riverside County. Edward D. Webster, Judge. Affirmed.

Marta I. Stanton, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Rhonda Cartwright-Ladendorf and Kristen Kinnaird Chenelia, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Rickey Edward Stuart appeals after he was convicted of two counts of making criminal threats, one misdemeanor count of elder abuse, and one misdemeanor count of vandalism. He contends that the evidence was insufficient to support the convictions of making criminal threats, and that the court erred in admitting certain evidence. We affirm the judgment.

FACTS AND PROCEDURAL HISTORY

Defendant was the caretaker for his 72-year-old mother, Arzella Colson. Defendant and his mother occupied rooms in the mother's house; defendant's 44-year-old brother, Jack Brewer, occupied a cabin behind the house. Although Brewer did not live in the house, he generally had free access to the common areas of the house, such as the kitchen.

Defendant was paid for his caretaking. When he got his money, he would buy groceries "for the house," and also went shopping for his mother. Brewer generally did not buy groceries for the household.

Defendant and his brother frequently argued. On November 5, 2008, Brewer was making a sandwich in the kitchen. Defendant, who had been drinking, came home and became upset when he saw Brewer making the sandwich, because Brewer generally did not contribute to buying groceries. Defendant said heatedly, "'You are eating my tuna.'" Defendant told Brewer and his mother that he did not want Brewer in the house. He warned Brewer that he had "better stay outside," and threatened to beat Brewer up if he came back.

Brewer warned defendant to "knock it off or I'll call the police." Then he left and went across the street to a neighbor's house. Brewer testified that he did not fear for his life, but he did not want to fight defendant because he believed defendant could overpower him; Brewer had suffered a shattered pelvis in an accident some years earlier.

Defendant also started yelling at his mother, raising his arm and saying "'I'll knock the fuck out of you.'" Defendant's mother shouted back at defendant and went to her room. She did not think that defendant would come into her room and she did not call police. Defendant's mother testified that defendant had never hit her and she did not believe he would hit her. However, she also stated during her testimony both that she was not scared of defendant, and that she was scared and angry when defendant threatened her.

Brewer used the neighbor's telephone to call police. He called police because he wanted defendant to leave his mother's house. In the meantime, defendant came to the neighbor's house and challenged Brewer to come outside and fight. Brewer stayed inside. Brewer denied being scared, but said he was nervous. Defendant told Brewer that if Brewer called police and defendant went to jail, defendant would see to it that Brewer went to jail too, and defendant would "scalp" Brewer in jail. Brewer did not fear for his life, and thought defendant was "just talking." The neighbor, Catherine Campbell, told defendant to leave; defendant went home.

Deputy Sheriff Frank James came in response to Brewer's call. Deputy James contacted Brewer; Brewer was nervous. He told the deputy that defendant had chased

him out of the house and across the street; defendant said he was going to kick his ass and scalp him.

Deputy James also spoke to defendant's mother. She was shaking and appeared anxious. Defendant's mother told the deputy that defendant called her names and threatened to "kick her ass." Defendant had raised his fist to her and threatened to punch her. Defendant's mother was fearful that defendant could become physical if there were future events.

An investigator for the People followed up with interviews of Brewer and defendant's mother. Defendant's mother repeated that defendant had come very close to her with a raised fist and said that he was going to "beat the fuck out of her." Brewer also repeated defendant's statement that he was going to scalp Brewer, and defendant's demand that Brewer "come outside and handle it like a man." Brewer told the investigator that he was afraid of defendant.

On other occasions before November 5, 2008, defendant broke out some windows in his mother's house. She was unable to afford repairs to the windows; Brewer boarded them up. Defendant would smash his mother's dishes against Brewer's door out behind the house, and he damaged a cupboard by hitting it with a can. He dented the refrigerator by throwing objects at it, and made a hole in the wall paneling. He damaged the door to his mother's bedroom, and wrote "'fuck you, Jack'" on his own door. Several times, defendant broke down the door to Brewer's room behind the house. Brewer had to replace the door five or six times, each time with larger, sturdier hinges. Defendant

would frequently throw things at Brewer's door; sometimes, Brewer would find a knife or screwdriver stuck in the door when he opened it.

At trial, the prosecutor introduced evidence that, in April 2006, defendant had kicked down the door to his mother's bedroom and grabbed her by the arm, wrenching her from the bed to her feet. A deputy sheriff responded to a domestic violence call, and spoke to defendant's mother. Defendant's mother told the officer that defendant had been drinking and became angry. He kicked in her bedroom door, grabbed her wrist, and hit her in the left arm. Defendant told his mother that he would "fuck [her] up" and kill her if she called the police.

In her trial testimony, defendant's mother tried to minimize defendant's culpability. As to the earlier incident in 2006, she admitted that defendant had broken her bedroom door and come into the bedroom, but she indicated that he had not grabbed and squeezed her arm; instead, she said that he had "just touched it," grabbing her around the wrist and immediately letting go. The police report of the earlier incident stated that the mother's arm was bruised, but at trial she said she bruised easily. While the responding officer had described defendant's mother as shaking when he interviewed her on November 5, 2008, defendant's mother claimed that, "I always shake."

As a result of the incidents leading up to November 5, 2008, defendant was charged with making criminal threats against his mother, making criminal threats against Brewer, misdemeanor elder abuse and misdemeanor vandalism.[1] The jury found

[1] A charge of embezzlement from an elder person had been dismissed before trial.

defendant guilty on all four charges. The court denied defendant's motion to dismiss the criminal threats charges based on insufficiency of the evidence. The court also denied a defense motion to reduce the criminal threats convictions to misdemeanors.

The court imposed the aggravated term of three years in state prison on count 1. The court also sentenced defendant to three years in state prison on count 2, to be served concurrently to count 1. The court imposed jail terms of six months on the misdemeanor charges, and granted credit for time served. The court suspended execution of sentence and granted defendant three years of supervised probation.

Defendant filed a timely notice of appeal.

ANALYSIS

I. Defendant's Convictions of Criminal Threats Were Supported by Substantial Evidence

Defendant urges that there was insufficient evidence to support his convictions of criminal threats under Penal Code section 422, because there was no immediacy to the threats, and the victims were not in sustained fear.

Contrary to defendant's contentions, however, the evidence was more than sufficient to support the convictions.

The elements of the offense of making a criminal threat are: (1) a person willfully threatens to commit a crime which will result in death or great bodily injury to another person; (2) the person makes the threat with specific intent that it be taken as a threat; (3) the threat is made under the circumstances so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat; (4) the threat causes the victim reasonably to be in

sustained fear for his or her own safety or for his or her immediate family's safety; and (5) the victim's fear was reasonable under the circumstances. (Pen. Code, § 422.)

Defendant urges that the evidence failed to show that his statements caused his mother or Brewer to be in sustained fear for their safety. He is incorrect.

As to Brewer, defendant became, as Brewer described it, "outraged," by Brewer making a sandwich. Defendant yelled loudly, and told Brewer to stay outside or risk getting beaten up. Brewer told defendant that Brewer would call police. Defendant tracked Brewer to the neighbor's house, where Brewer had gone for refuge, and angrily demanded that Brewer come outside and settle the matter "like a man." Both Brewer and the neighbor understood this as an immediate invitation for a physical fight. Defendant knew that Brewer intended to call police; he threatened Brewer that, if defendant were taken to jail, defendant would make sure that Brewer was also taken to jail, and said he would "scalp" Brewer in jail.

All of these statements were intended to convey to Brewer that defendant would physically harm Brewer if Brewer attempted to leave the neighbor's house or come home. Brewer's trial testimony indicated that his fear of defendant was both sustained and reasonable. For example, Brewer stayed inside the neighbor's house rather than accede to defendant's demands to come outside and settle the dispute "like a man." Brewer, even at trial, was afraid of defendant: "My brother is older than me. He's stronger than me. He's overpowering. If we were to fight, I wouldn't have the better end of it." Defendant had been drinking alcohol, and his behavior was unpredictable. "When someone is drinking alcohol, just don't know what kind—what's going through

someone's head at that time. I'm not going to go out there and confront somebody that's been drinking a lot of alcohol and what they could do, you know. Just not into that." Further, Brewer's physical condition was vulnerable. "I've got health conditions. I can't fight. I've got a shattered pelvis. I can't do things like that."

Both Brewer and defendant lived on the same premises, although Brewer occupied separate quarters behind the house. Brewer testified that defendant had broken down the door to Brewer's room numerous times, and would smash dishes against the door, or throw deadly objects such as knives or screwdrivers at the door. Brewer would later open the door and find the object protruding from the wood.

On the date of the November 5, 2008, incident, Brewer felt compelled to leave the premises. The evidence showed that Brewer took the threats seriously, because he called police and would not return home as long as defendant was there.

As to defendant's mother, the evidence was that defendant, continuing his raging outburst, called his mother names, came close to her, raised his arms and threatened to "knock [or beat] the fuck out of" her. Immediately before making this statement, defendant had smashed a can of soup in the kitchen, with such force as to break the can open and strew soup everywhere. Defendant's mother backed up and retreated to her room. While defendant focuses on the mother's statements that she did not really fear defendant, she also testified that she was scared of him, and told the investigator that she feared physical harm. Defendant's mother treated the matter seriously enough to convey what had happened to Deputy James at the scene, and she also obtained a restraining

order against defendant. She even told the officer that she feared defendant would physically harm her if there were future events.

Defendant's reliance on *In re Ricky T.* (2001) 87 Cal.App.4th 1132 is unavailing. There, a high school student became angry when a teacher opening a door bumped the student with the door. The student stated, "'I'm going to get you.'" The teacher sent the student to the administration office, and the student was punished with a suspension. (*Id.* at p. 1135.) On appeal from a conviction for misdemeanor criminal threats, the Court of Appeal found insufficient evidence to support the conviction. Beyond the statement, "'I'm going to get you,'" the student neither did nor said anything further. There was no history of prior disagreements, and no evidence that a physical confrontation was imminent. In context, the student's statement lacked credibility as a serious, deliberate statement of purpose. Police were not called until the next day, indicating no immediate fear on the part of the teacher. The threat, "'I'm going to get you,'" was vague and ambiguous, with no visible prospect of execution. (*Id.* at pp. 1138-1140.)

The case here is wholly different. Defendant's physical conduct was far more belligerent. He actually raised his fist to his mother and threatened to beat her. Defendant's threat was immediate, credible, and specific. The threat followed immediately on the heels of an eruption of physical force sufficient to burst a can of soup by smashing it against a counter. Defendant had a history of aggressive conduct, including such conduct against both victims. Defendant frequently drank, he frequently was angry when he drank, and he frequently smashed and threw things when he was angry. Defendant's erratic behavior was physically violent and destructive, although

perhaps more typically toward inanimate objects. It was sufficiently immediate, specific and credible, that his mother retreated to her bedroom and Brewer retreated across the street. *Ricky T.* provides defendant no comfort.

II. The Incident of Prior Abuse Was Properly Admitted

Defendant next contends that the trial court erred in admitting evidence of the prior act, i.e., the incident of elder abuse in 2006. Defendant urges that the incident was more prejudicial than probative, and thus should have been excluded under Penal Code section 352; he also argues that the admission of the evidence denied his rights to due process, equal protection and a fair trial.

Evidence Code section 1109 provides in relevant part, "(a)(2) Except as provided in subdivision (e) or (f), in a criminal action in which the defendant is accused of an offense involving abuse of an elder or dependent person, evidence of the defendant's commission of other abuse of an elder or dependent person is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352."

This provision has been held constitutional both on its face and as applied. (See *People v. Price* (2004) 120 Cal.App.4th 224, 240; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1310-1313.)

Defendant's claim of improperly admitted evidence is reviewed under the abuse of discretion standard. (*People v. Jennings*, *supra*, 81 Cal.App.4th at p. 1314.)

The evidence admitted at trial was of an incident of elder abuse or domestic violence that had taken place about two years earlier. As in the case of the current offenses, defendant had been drinking, and he became angry. Defendant's mother was in

her room, and heard what sounded like a bowl crashing in the sink, and heard defendant say, "fuck you, fucking bitch." Defendant kicked down the door to his mother's bedroom, kicking so hard that the doorframe itself was broken; the repercussion knocked a mirror off a wall in another room. Defendant's mother was on her bed; defendant strode up to her, and grabbed her by the wrist with sufficient force to drag her to her feet. He then hit her on the upper left arm. At that time, defendant threatened to "fuck [her] up" and "kill her" if she called the police. The deputy who responded to that call noted that defendant's mother was visibly shaken to the point where she had to sit down to regain control of her emotions. Her wrist was freshly bruised and there was a red mark on her left arm where she said defendant had struck her. Defendant pleaded guilty to one count of elder abuse in connection with the 2006 incident.

The trial court properly employed the balancing test, assessing the prejudicial value of the evidence against its probative value. The court also gave a limiting instruction, advising the jury that it could not consider the prior act of elder abuse unless it found by a preponderance of the evidence that defendant had committed the prior act. In addition, the jury was not required to infer that defendant had the disposition to commit another act of elder abuse.

Defendant urges that the prior act was overly prejudicial because it actually involved some physical violence, whereas the present charges did not involve any actual physical contact. When prior crimes evidence is vicious, and the charged crimes are not, or if the prior crime is remote and dissimilar to the charged offenses, it is generally excluded under Evidence Code section 352. (See *People v. Harris* (1998) 60

Cal.App.4th 727, 738-740.) Here, however, unlike in *Harris*, the differences between the prior crime and the charged crime were not extreme. Although the earlier incident involved some physical contact, it was not out of proportion to the charged offense. It was not remote in time. The kind of conduct involved was similar to the charged offense.

The prior offense was relevant and probative on the issues of defendant's intent and purpose, the reasonableness of the victim's (defendant's mother's) fear of immediate bodily injury, as well as the mother's credibility. The evidence was properly admitted. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 912-913.)

DISPOSITION

The judgment is affirmed.

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/s/ McKINSTER
J.

We concur:

/s/ RAMIREZ
P. J.

/s/ RICHLI
J.